

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

JOHN L. PHELPS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

DOCKET NUMBER WD73263

Date: November 1, 2011

Appeal from:
Jackson County Circuit Court
The Honorable Jack R. Grate, Jr., Judge

Appellate Judges:
Division Four: Lisa White Hardwick, Chief Judge, Presiding, Mark D. Pfeiffer,
Judge, and Gary Ravens, Sp. Judge

Attorneys:
Ruth Sanders, Kansas City, MO, for appellant.
Shaun J. Mackelprang and Jayne T. Woods, Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

JOHN L. PHELPS

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v.

STATE OF MISSOURI,

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Jackson County

Before Division Four: Lisa White Hardwick, Chief Judge, Presiding, Mark D. Pfeiffer, Judge, and Gary Ravens, Sp. Judge

John Phelps appeals the circuit court's dismissal of his Rule 24.035 motion as untimely. Phelps contends the court improperly included the day he was delivered to the Department of Corrections ("DOC") in calculating whether his *pro se* post-conviction motion was filed within the 180-day deadline set forth in Rule 24.035(b).

REVERSED AND REMANDED.

Division Four holds:

(1) The circuit court clearly erred in calculating the timeliness of Phelps's post-conviction motion. Rule 24.035(b) provides that, where no appeal of a judgment upon a guilty plea is taken, the post-conviction motion "shall be filed within 180 days of the date the person is delivered to the custody of the department of corrections." Rule 44.01(a) applies to Rule 24.035 actions and

specifically states that, when computing any time period under the rules, the day of the act that triggers the running of the time period is not to be included. Thus, the day Phelps was delivered to the DOC is not to be included in computing the 180-day time period. When the time period is properly computed pursuant to Rule 44.01(a), Phelps's *pro se* motion was filed 180 days after his delivery to the DOC and was, therefore, timely.

(2) Phelps did not waive the application of Rule 44.01(a) by failing to assert its application in his Rule 24.035 motion, as the rule's applicability was not a "claim for relief" under Rule 24.035. Likewise, Phelps did not waive the application of Rule 44.01(a) by failing to argue its applicability in the circuit court. Although both parties had an obligation to bring all relevant authority to the court's attention, neither party referenced Rule 44.01(a) in the court below. Moreover, Phelps never conceded that 181 days had elapsed but argued then, as he does in this appeal, that he filed his *pro se* motion 180 days after his delivery to the DOC.

Accordingly, the circuit court's order dismissing Phelps's Rule 24.035 motion is reversed and the case is remanded to the circuit court for further proceedings in accordance with Rule 24.035.

Opinion by: Lisa White Hardwick, Chief Judge

November 1, 2011

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